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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 23

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JUNIUS IRVING SCALES, *Petitioner*, v. UNITED STATES OF AMERICA.	No. 29

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I.

CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE

In support of the constitutionality of the membership clause, the Government has resorted to several arguments and devices which call for comment.

(1) The Government reads words into the membership clause which are not there. The clause proscribes *membership* in a group with *knowledge* that its purpose is to advocate the overthrow of the government by force and violence. The Government now proposes (Govt. Br. pp. 41, 44-45) to read into the clause not only a requirement of personal intent to overthrow the government (an addition which is at best of dubious validity, Pet. Br. pp. 17, 23), but also a restriction to "active" membership.

There is not the slightest warrant in the language or structure of the Smith Act to support the Government's

proposition. In *Galvan* v. *Press*, 347 U. S. 522, this Court refused to read even the requirement of personal knowledge into the Communist deportation provisions of the Internal Security Act. In the present case, as has been pointed out (Pet. Br. pp. 16-17), Congress added the requirement of personal knowledge to the membership clause by specific amendment to the bill which became the Smith Act. Had Congress wished also to add the requirements of personal intent and activity, it could readily have done so.

But even if the clause be construed as limited to "active" membership, its constitutionality would not be aided. Activity as a member of a group may be innocent or criminal. As this Court stated in the *Dennis* case (341 U. S. at 516) it is "the nature of their [Smith Act defendants'] activities" that touches the constitutional issue. The other provisions of the Smith Act undertake to punish various types of activity, conspiratorial or individual. But the membership clause does not, and its constitutionality can not be saved by the Government's attempt to read into the clause everything else in the Act.

(2) The Government strains to maintain simultaneously the discordant propositions, both unsound, that (a) the charge under the membership clause is tantamount to a charge of conspiracy, and (b) the existence or non-existence of a conspiracy is irrelevant to the constitutionality of the Smith Act's application in a particular case.

In support of the first proposition, the Government appears to maintain that every member of the Party is *ipso facto* a conspirator with the other members to achieve unlawful ends. Thus, referring to the doctrine of "democratic centralism", the Government concludes (Govt. Br. p. 10) that ". . . there is no place in the Party for those who would oppose its program of forceful and violent overthrow of the Government." And subsequently the Govern-

ment (Govt. Br. p. 42) quotes approvingly from Mr. Justice Jackson's separate opinion in *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 431-32, the declaration that "Every member of the Communist Party is an agent to execute the Communist program" and the conclusion that "Individuals who assume such obligations [membership in the Party] are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program."

It is one thing to uphold a statutory provision intended to stop Communist Party members from serving as labor union leaders (as was done in the *Douds* case), and quite another thing to uphold a criminal statute intended to put Communist Party members in jail.[1] It is one thing for courts to rule that a conspiracy among the leaders of the Communist Party is a clear and present danger, and quite another for them to rule that every member is a conspirator and that therefore individual membership is a clear and present danger.

Of course, Communist Party membership can not be regarded as automatically carrying with it the conspiratorial and criminal attributes which the Government seeks to attach. *Schneiderman* v. *United States*, 320 U. S. 118; *Herndon* v. *Lowry*, 301 U. S. 242. Congressional investi-

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[1]It is clear that, in the passages from his opinion in the *Douds* case upon which the Government relies, Justice Jackson was expressing his opinion about Communist Party membership in general, and as a basis for regulatory action, rather than a postulate for application to individuals. Indeed, he supported his opinion upholding a portion of "non-Communist affidavit" provision reviewed in the *Douds* case by pointing out that that statute does not do precisely what the membership clause does do (339 U. S. at 434): "But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any above board activity normal in Party struggles under our political system. . . . *No individual is forbidden to be or become* a philosophical Communist or *a full fledged member of the Party*" (emphasis supplied).

gations and other inquiries have made it a matter of common knowledge that people have joined the Communist Party for and with the most diverse reasons and intentions, many of which, however foolish, are quite devoid of any criminal quality whatsoever.[2] Indeed, the Government itself in Smith Act conspiracy cases has freely conceded that there are many Communist Party members who are not party to any criminal conduct or conspiracy, and has called, as prosecution witnesses, former Party members who testified that their intentions as Party members had nothing to do with force and violence or any other criminal objective.[3]

Not content with grafting intent and activity onto the membership clause, the Government now seeks to make it encompass the whole notion of conspiracy, and argues (Govt. Br. p. 45) that the clause "partakes of the concert-of-action, combination, and acting-together which characterize conspiracy". If that is the burden of the Government's accusation against Scales, let him be indicted on that basis. Let the persons with whom he concerted, combined, or acted be named, and the concert, combination, and joint action be proved. This effort on the Government's part to identify membership with conspiracy renders either the conspiracy or the membership provisions of the Smith Act meaningless surplusage,[4] and manifests an altogether

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[2]See e.g., *The Communist Party of the United States of America—A Handbook for Americans*, printed by the Senate Internal Security Subcommittee for the use of the Senate Committee on the Judiciary (84th Cong., 1st Sess., Dec. 21, 1955), pp. 42-50.

[3]See, e.g., the brief (at p. 13) for *amici curiae* Hall and Kuzma, filed in *Yates* v. *United States*, Nos. 6, 7 and 8 (Oct. Term, 1956), based on *United States* v. *Fujimoto*, No. 13915 (C. A. 9th), Tr. 1456, 7148-49, 7397-98, 14690, and 14696.

[4]It should not be overlooked that the original Smith Act (in effect from 1940 to 1948), as well as the version in force since June 24, 1956 (Govt. Br. p. 2 footnote 1), contains its own conspiracy provision. It is inconceivable that Congress intended the membership clause to be merely a duplicate of the conspiracy clause, but that is essentially what the Government contends and what the lower court held (227 F. 2d at 587).

extraordinary disregard for elementary principles of criminal law (Pet. Br. pp. 23-28).

Along with this painful effort to make membership the same as conspiracy (so as to bring this case within the Court's statements about conspiracy in the *Dennis* case), the Government argues that the presence or absence of conspiracy doesn't really matter (so as to avoid being torpedoed by the Court's statements about conspiracy in the *Dennis* case). "In itself, the particular word 'conspiracy' is obviously not the key to the constitutional problem", we are told (Govt. Br. p. 47). It is interesting to compare the Government's brief in *Mesarosh* v. *United States*, No. 20 (October term, 1956), where it is stated (at p. 60):

> "It is the existence of such a highly-organized conspiracy with rigidly disciplined members . . . which justifies the constitutional limitation of First Amendment rights. *Dennis* v. *United States*, 341 U. S. 494, 509-11."

Conspiracy or no, the Government here seeks (Govt. Br. p. 45) to support Scales' conviction as a Party member on the ground that his conduct involved "concert-of-action, combination, and acting-together". But Scales has been convicted under a statute which does not proscribe and an indictment which does not charge any of these things, and the Government's effort must fail.

(3) The Government misstates the bearing on this case of Justice Brandeis' concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 372. Inasmuch as the California statute there in question proscribed membership in as well as the organization of groups advocating criminal syndicalism, an opinion concurring in an affirmance of the conviction (Govt. Br. p. 47) "could not have been consistent, therefore, with a view that a statute denouncing 'membership' as a crime was void on its face."

This analysis is faulty, in that it overlooks that Justices Brandeis and Holmes concurred in the result in the *Whitney* case only because the defendant had not, in the California courts, challenged the statute's constitutionality under the clear and present danger test. See *Whitney* v. *California*, 274 U. S. at 379; *Dennis* v. *United States*, 341 U. S. at 513-14. On that ground, had the point been raised below, the California statute might have been held "void" on its face, and Justice Brandeis' opinion leaves little doubt that he and Justice Holmes would have so concluded. Since the point was not raised, and since there *was* evidence linking the defendant with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy, Justices Brandeis and Holmes concurred in the result, while abjuring the reasoning of the Court's opinion.

(4) The Government attempts (Govt. Br. pp. 49-51) entirely to eliminate the element of *probability* of evil consequences from the clear and present danger test. It is true, as was stated in the *Dennis* case (341 U. S. at 509), that "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." On the same principle, of course, it is a crime for a one-armed midget to assault Rocky Marciano. But (and this is an important matter frequently overlooked in the Government's brief)[5] the Smith Act does not proscribe and Scales' indictment does not charge "an attempt to overthrow the Government by force".[6]

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[5]See, *e.g.*, the Government's reliance (Govt. Br. p. 59) on Lautner's testimony that "the ultimate aim of the Communist Party" is violent governmental overthrow, and on Clontz' testimony to the same effect (Govt. Br. pp. 93-94). Of course, the "ultimate aim" of the Communist Party is irrelevant to the Smith Act, wherein the only question is what the Party *advocates*.

[6]Conspiracies to overthrow the Government are punishable under 18 U. S. C. 2384. See Mr. Justice Douglas' dissenting opinion in the *Dennis* case, 341 U. S. at 581.

An actual revolt, or an attempt or conspiracy to revolt, is a crime no matter how desperate, and raises no problem under the First Amendment. But the Smith Act proscribes nothing but advocacy, and the clear and present danger test must be met. Obviously, a conspiracy of Party leaders to advocate force and violence and organize the Party to that end is far more pregnant with the substantive evil than the circumstance of individual membership in the Party. And the Government cannot make these things lie level on the scales, for the element of probability is specifically included in Judge Learned Hand's test, as approved by this Court in the *Dennis case* (at p. 510): "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Under this test, under the logic of Justice Brandeis' opinion in the *Whitney* case, and under the constitutional provisions and traditions[7] on which this Court's decisions are based, the membership clause must be held unconstitutional.

II.

SECTION 4(f) OF THE INTERNAL SECURITY ACT

The Government's response, to petitioner's argument (Pet. Br. pp. 28-34) that this prosecution is barred by Section 4(f) of the Internal Security Act, depends upon the following propositions:

(a) The purpose of Section 4(f) is to ensure that the membership clause of the Smith Act, which expressly requires knowledge as an element of the offense, will not be

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[7]It is interesting to note that the English statute of 1799, directed against membership in certain societies (Pet. Br. pp. 13-14), was closely linked in mutual influence and stimulus with our own Alien and Sedition Acts. See Dauer, *The Adams Federalists* (1953), pp. 157-59; J. M. Smith, *Freedom's Fetters* (1956), p. 67.

construed to punish membership without knowledge (Govt. Br. pp. 55-56).

(b) Section 4(f) should be construed in such a way that it has no limiting or other meaningful effect on any other statutory provision (Govt. Br. p. 55).[8]

(c) Section 4(f) should be construed in such a way that all Communists can avoid, by pleading self-incrimination, compliance with the registration provisions of the Internal Security Act, except Communist Party members (and officers!) who are inactive, who do not know the unlawful purposes of the Party as found by Congress,[9] and who have no intention of carrying those purposes into effect (Govt. Br. 51-56, which contains not a word in reply to petitioner's argument in its brief, pp. 32-33, pointing out that such is the inevitable consequence of the Government's position).

Where such arguments are put forward by skilled lawyers, it is a fair inference that there are no better ones.

III.

IMPANELLING OF THE GRAND JURY

Petitioner's motion challenging the grand jury panel was made before trial, and the motion was considered by the trial judge on its merits. The Court of Appeals (227 F. 2d 581, 592) also ruled on the merits of petitioner's chal-

[8] The government's remark (Govt. Br. p. 55) that if the membership clause "did not cover Communists, it would be unlikely to cover anybody", is apparently frivolous, as earlier in its brief (p. 33) it points out that the Smith Act is also directed against Nazi and Fascist movements.

[9] See 50 U. S. C. 781 (15), specifically referring to Communist "indoctrination" for the violent ends specified in the other paragraphs of this section.

lenge, and made no reference to the Government's contention that there had been a waiver. Under these circumstances, and since the petitioner complied with the basic requirement of Rule 12 that such a motion be made before trial, this Court should consider the merits of the challenge.[10] *Ballard* v. *United States*, 329 U. S. 187, 190; *Wrightson* v. *United States*, 222 F. 2d 556.

The Government, in discussing the merits of the challenge, ignores *United States* v. *Silverman*, 129 F. Supp. 496, 509, upholding a challenge to the grand jury panel where, as in this case, the jury commission did not know whether or not the box contained the names of at least three hundred qualified persons.[11] Likewise, the Government ignores this Court's decision in *Ballard* v. *United States*, *supra*, that the petitioner need not show that he, individually, was prejudiced, if in fact the grand jury was illegally impanelled.

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Respectfully submitted,

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[10]In the *Carruthers* and *Wright* cases cited in the Government's brief (p. 66) the defendant was held to have waived his right to challenge because he made his motion after trial and conviction.

[11]In an attempt to show that the box contained the names of at least three hundred qualified persons, the Government overstates Mr. Cowles' and Mr. Reynolds' (the jury commissioners) testimony. Mr. Cowles at various times placed the number of names in the box at 500, more than 300, probably 400, and 450 (Motion Tr. 83, 84) and stated that he did not know all or practically all the people whose names went into the jury box, but that he had "a pretty good knowledge of the people there, their background and present status" (Motion Tr. 84). Mr. Reynolds stated (Motion Tr. 89) that the potential jurors were not asked about their citizenship status or residence in the district.